



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of the Revocation of a Driveway
Access Permit by the Department of
Transportation to Mike Meyers

Case No. TR-12-0033

FINAL DECISION

By letter dated August 24, 2012, Mike Meyers, requested a hearing pursuant to Wis. Stat. § 86.073(3) to review the decision of the Department of Transportation to revoke his driveway access permit. The driveway is located on United States Highway 51, in the Town of Minocqua, Oneida County, Wisconsin. Pursuant to due notice, a hearing in this matter was conducted in Madison, Wisconsin, on December 18, 2012. Mark F. Kaiser, Administrative Law Judge, presided. The parties filed post hearing briefs. Simultaneous initial briefs were filed on January 11, 2013. Simultaneous reply briefs were filed on January 31, 2013.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

Mike Meyers, by

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Wisconsin Department of Transportation, by

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The Administrative Law Judge issued a Proposed Decision in this matter on March 15, 2013. Mike Meyers, the petitioner, filed objections to the Proposed Decision on March 29, 2013. The Department of Transportation (Department) filed comments in support of the Proposed Decision on April 1, 2013. The petitioner raised four objections to the Proposed Decision.

Three of these objections flow from the fact that the driveway access permit that is the subject of this matter was issued by the Department without an application for a permit. The petitioner argues that since no application under Wis. Stats. § 86.07(2) was filed, the Department did not have authority to issue the subject permit and does not have authority to revoke the permit pursuant Wis. Stats. § 86.073. Additionally, the petitioner argues that the Department did not satisfy its burden to prove that the subject permit was issued pursuant to Wis. Stats. § 86.07(2).

The Proposed Decision adequately addresses the significance of the fact that the subject permit was issued without an application. Although the permit for the subject driveway was issued by the Department without an application, the Department is treating the permit as one issued pursuant to Wis. Stats. § 86.07(2). The Department initiated the process under Wis. Stats. § 86.073 to revoke the subject driveway access permit and the petitioner requested a hearing to review the Department's action as allowed under Wis. Stats. § 86.073. If the subject permit is not treated as one issued under Wis. Stats. § 86.07(2), there is no apparent statutory scheme for regulating the access. It is understood that the petitioner is not challenging the loss of a driveway access from his property directly onto USH 51 as much as arguing that he is entitled to compensation for the loss of direct access. This is an issue beyond the scope of the Division of Hearings and Appeals' (DHA) authority.

In this matter, The DHA's only jurisdiction is to review the Department's actions initiated under Wis. Stats. § 86.073. A reviewing court may reverse this decision and determine that the petitioner was not entitled to have the revocation of the driveway access permit reviewed by the DHA, but is entitled to compensation for the loss of a driveway access. However, unless such a review occurs it is appropriate for the DHA to proceed under the provisions of Wis. Stats. § 86.073. As explained in the Proposed Decision, even though no application for a permit was filed, it is reasonable to treat the permit as one issued under Wis. Stats. § 86.07(2). Consequently, the petitioner's objection that the Department did not satisfy its burden to prove that the subject permit was issued pursuant to Wis. Stats. § 86.07(2) is immaterial for purposes of this decision.

The petitioner's fourth objection is that the Department did not prove that the subject driveway "unduly impairs the safety, convenience and utility of the highway." This argument is based on a misreading of Wis. Admin Code § Trans 231.03(2). Wis. Admin Code § Trans 231.03(2), provides:

The number of driveways permitted serving a single property frontage along a state trunk highway shall be the minimum deemed necessary by the department for reasonable service to the property without undue impairment of safety, convenience, and utility of the highway.

The petitioner is interpreting the phrase "without undue impairment of safety, convenience, and utility of the highway" in this administrative rule as meaning that a driveway must be allowed to continue unless the Department can prove that it constitutes an "undue impairment of safety, convenience, and utility of the highway." That is a misreading of the phrase. The phrase is intended to authorize the Department to not permit even the minimum number of driveways

necessary for the reasonable service to an abutting property if that number of driveways would constitute an undue impairment of safety, convenience, and utility of the highway.

The petitioner also objects to the exclusion of testimony related to possible future uses of the property which may render the access from Lakeview Drive inadequate. Speculative evidence regarding the petitioner's plans for the property was properly excluded. The petitioner's property retains its access rights. The right of access includes the right to apply for a permit under Wis. Stats. § 86.07(2) and to have that application be judged on the criteria for granting permits for access points. If, and when, the use of the property changes, the petitioner can apply for a driveway access permit onto USH 51 and that application will be evaluated on the use of the property at that time. The objections raised by the petitioner are not persuasive. After reviewing the record in this matter, the Proposed Decision is adopted as the Final Decision in this matter.

Issues

The issues for the hearing are whether the factual grounds set forth in the Department of Transportation's letters dated May 7, 2012 and July 25, 2012, for revoking driveway permit #43-96-70 (977) are true and, if so, whether those grounds constitute a reasonable basis for the revocation of the driveway access permit. The burden of proof for these issues is on the Department of Transportation. The petitioner raised an additional issue. That issue is whether the permit at issue was issued by the Department pursuant to its authority under Wis. Stats. § 86.07(2). The petitioner raised this issue as an affirmative defense. The petitioner argues that if the permit was not issued under Wis. Stats. § 86.07(2), the Department has no statutory authority to revoke it. This issue is raised as a challenge to the Department's authority and, in turn, to the Division's jurisdiction in this matter. There are no disputed factual issues that need to be decided in ruling on this issue. The petitioner has the burden of persuasion with respect to his assertions.

Findings of Fact

The Administrator finds:

1. Mike Meyers (Meyers) is the owner of property located in the town of Minocqua (the Meyers property). The Meyers property abuts the west side of United States Highway 51 (USH 51). USH 51 is classified as a Tier 2B highway. A Tier 2B highway is a high traffic volume, high priority route. The average daily traffic (ADT) for the stretch of USH 51 that passes the Meyers property is approximately 19,000 vehicles. USH 51 is the primary north-south highway route in Wisconsin. It is used by tourists travelling to northern Wisconsin and also by logging trucks and other commercial vehicles. On a summer weekend traffic counts can exceed 28,000 vehicles per day. The posted speed limit for the stretch of USH 51 passing the Meyers property is thirty miles per hour.

2. The Meyers property currently has a driveway access onto USH 51. On November 5, 1970, the Department of Transportation (the Department) issued a permit for the driveway access to USH 51 from the Meyers property. The permit is permit no. 43-96-70 (977) (exh. 100). Permit no. 43-96-70 (977) was issued by the Department to Rose Niske, a prior owner of the Meyers property. No application was submitted to the Department for the permit. The Department issued the permit at the time it was preparing to commence a highway improvement project expanding the stretch of USH 51 that passes the Meyers property to a four lane roadway.

3. The Meyers property is a triangularly shaped parcel located at the intersection of USH 51 and Lakeview Drive. Lakeview Drive is also known as "Old 51." There is one building on the parcel. The building is used as residential rental property. In addition to the driveway access onto USH 51, the Meyers property has a driveway access onto Lakeview Drive.

4. The Department is planning a highway improvement project for the stretch of USH 51 between Front Street and 3rd Avenue in the towns of Minocqua and Woodruff (exh. 110). As part of the project, the Department is seeking to reduce the number of access points onto USH 51. To accomplish this, the Department reviewed the accesses on the stretch of highway that would be reconstructed and identified approximately forty driveway accesses that it considered unnecessary. Consistent with this goal, the Department proposed to eliminate the USH 51 driveway access to the Meyers property.

5. The Department initially commenced negotiations to purchase the Meyers property driveway access onto USH 51. The Department subsequently sent a notice to Meyers that it intended to revoke driveway access permit no. 43-96-70 (977). By letter dated May 7, 2012, the Department's access management engineer for the North Central Region issued an order revoking driveway access permit no. 43-96-70 (977) (exh. 102). On June 5, 2012, Meyers appealed the regional office's revocation order to the Department (exh. 105). By letter dated July 10, 2012, the Department affirmed the regional office's decision (exh. 106).

6. The basis for the Department's decision to revoke driveway access permit no. 43-96-70 (977) as stated in the Department's July 10, 2012 letter is that "[the Meyers] property currently has sufficient access to USH 51 via a side road. [The] property is currently used as rental property and is a destination site." By letter filed on August 28, 2012, Meyers requested a hearing before the Division of Hearings and Appeals to review the Department's revocation order.

7. The accident rate for the stretch of USH 51 scheduled to be reconstructed is higher than comparable highway stretches. The crash data for the time period from January 2004 through December 2008 for the segment of USH 51 scheduled to be reconstructed was analyzed as part of a safety study. For this time period the accident rate was 342.91 accidents per hundred million vehicle miles. This compares to a statewide crash rate of 242.8 accidents per hundred million vehicle miles for the same time period (exh. 140). In a more recent study the Department calculated that the accident rate dropped to 272 accidents per hundred million miles (testimony of Richard Handrick). The driveway access from the Meyers property to USH 51 is not

conclusively tied to any specific accident. However, each access point results in the addition of eleven conflict points. Engineering studies demonstrate that reducing the number of conflict points increases highway safety (exh. 142).

8. The alternate access to the Meyers property is from Lakeview Drive. The route for northbound motorists on USH 51 to this access is to drive 412 feet past the Meyers property, turn left on a proposed new road that will be a continuation of existing Huber Lane. Existing Huber Lane runs east from USH 51. As part of the project, Huber Lane will be extended west of USH 51 and intersect with Lakeview Drive.¹ The motorist will drive 270 feet on Huber Lane and then turn left onto Lakeview Drive. The motorist will travel 478 feet on Lakeview Drive and turn left into the driveway for the Meyers property. Access to the Meyers property by the Lakeview Drive driveway for northbound motorists will add 1,160 feet of driving distance for motorists northbound on USH 51 compared to accessing the property from the existing USH 51 driveway access (exh 5A).

9. For a motorist southbound on USH 51, the alternative access is similar except that the motorist will turn right onto new Huber Lane and will not pass the Meyers property prior to having to exit USH 51. This alternative access will add 336 feet to the trip compared to accessing the Meyers property directly from the existing USH 51 driveway access.²

10. The access to the Meyers property is not readily apparent to motorists passing the property on USH 51. The greatest inconvenience will be to motorists who miss the turn onto the new Huber Lane. However, for the Meyers property current use as a residential rental property this alternative access is reasonable. As residential property, the occupants of the property and their guests will be the primary motorists seeking access to the property. These persons will know the route to the Lakeview Drive driveway access.

11. Meyers testified that he has plans to operate a real estate business from the property at some time in the future. If and when this change occurs, customers unfamiliar with the driveway to the property from Lakeview Drive may have difficulty accessing it. If southbound motorists miss the right turn onto Huber Lane, they will have to drive an additional 3245 feet to Front Street before they can turn around and return to Huber Lane (exh 4A).³ This confusion could likely be alleviated with minimal signage. Alternatively Meyers would have the option of applying for a new driveway access to the property from USH 51. This application would be evaluated on the property's use as commercial property.

¹ The route for northbound motorists to the Lakeview Drive driveway is made somewhat more convoluted because as part of the project the Department also intends to close the intersection of USH 51 and Lakeview Drive.

² This number was calculated by using James Bricker's exhibit 4A. The difference in the distance between Meyers' existing USH 51 driveway and Huber Lane (412 feet) was subtracted from the distance between Huber Lane and the Lakeview Drive driveway access (478 feet). This was done because a southbound motorist would not drive the stretch of USH 51 south of Huber Lane. The remainder from this operation is 66 and that number is added to the distance the motorist would travel on Huber Lane (270 feet) for a total additional travel distance of 336 feet.

³ This is assuming the southbound motorist chooses not to drive into a business parking lot and turn around or perform a "U" turn. The Meyers property is located on an isthmus. Front Street is the first cross street south of the Meyers property.

12. The neighboring properties to the Meyers property house a laundromat and a motel. These businesses currently each have a driveway access to USH 51. After completion of the reconstruction project, the proposal is that the two businesses will share one driveway access to USH 51.

13. The removal of the driveway access from the Meyers property to USH 51 will improve traffic safety on USH 51. The Meyers property will still have access to the highway via an alternative driveway access from Lakeview Drive. The Lakeview Drive access constitutes a reasonable, alternative access to the existing access from USH 51.

Discussion

The Department is seeking to revoke driveway access permit no. 43-96-70 (977) which authorizes the maintenance of a driveway access to USH 51 from property currently owned by Michael Meyers. The issue to be considered in reviewing the Department's decision to revoke the driveway access permit is whether reasonable, alternative access to the property exists if the driveway access to USH 51 is removed. However, before reaching this issue a legal issue raised by Meyers must be addressed. That issue is whether the Department has the authority to revoke this driveway access permit.

The Department cites Wis. Stats. § 86.073 as its authority for revoking driveway access permit no. 43-96-70 (977). Wis. Stats. § 86.073(1) provides that "If a district office of the department denies a request for a permit under s. 86.07(2) to construct an entrance to a state trunk highway from abutting premises or *revokes a permit issued under s. 86.07(2)*, the department shall, upon written request by the applicant within 30 days after the denial, review the decision of the district office." (emphasis added) There is no dispute the Department issued permit no. 43-96-70 without an application under Wis. Stats. § 86.07(2). The petitioner argues that because no application for a permit was filed, the permit at issue was not issued pursuant to Wis. Stats. § 86.07(2), and, consequently, the Department cannot use the statutory procedure related to Wis. Stats. § 86.073 to revoke the permit.

Wis. Stats. § 86.073(1) can be read to support the petitioner's argument. This reading of the statute would follow the logic that the provisions of Wis. Stats. § 86.073(1) only apply to a driveway access permit that was issued in response to an application filed under Wis. Stats. § 86.07(2). The only explicit statutory reference to the revocation of a driveway access permit is found in Wis. Stats. § 86.073(1). Thus, Meyers argues that if driveway access permit no. 43-96-70 (977) was not issued in response to an application, it cannot be revoked. However, interpreting the statute in this manner leaves a large void in the regulation of driveway access. At various times the Department issued permits for driveways that existed prior to the enactment of Wis. Stats. § 86.07. These permits have been issued without applications. If one were to accept the petitioner's interpretation, these driveway permits would be permanently grandfathered.

The Department has a responsibility and right to regulate the use of its highway right-of-ways by abutting property owners. There is no apparent reason that the Department could not

have required landowners to apply for a permit to maintain an existing driveway. However, that would have been an exercise in bureaucratic paper shuffling. The Department's practice of issuing the permits without applications is reasonable. An equally reasonable interpretation of Wis. Stats. § 86.073(1) is that the procedural protections set forth only apply to permits issued in response to an application filed under Wis. Stats. § 86.07(2). In other words, unless the permit was issued in response to an application under Wis. Stats. § 86.07(2), the Department can remove the driveway access without giving the landowner a right to a review of the decision or an administrative hearing.

The legislative intent underlying the provisions of Wis. Stats. § 86.073(1) is best achieved by providing an abutting landowner a right to a hearing to review a decision by the Department to revoke a driveway access regardless of whether an application for the driveway access permit was ever filed. That is the process the Department has chosen to follow. The Department offered Meyers the procedural protections to holders of driveway access permits set forth in Wis. Stats. § 86.073(1) despite the fact that the permit was not issued in response to an application filed under Wis. Stats. § 86.07(2). This is the most reasonable interpretation of Wis. Stats. § 86.073(1). The Department has the authority to revoke driveway access permits that were issued without an application filed under Wis. Stats. § 86.07(2) and abutting property owners who have been issued permits without an application have a right to have the Department's revocation of those permits reviewed.

Meyers primary argument is that the Department should be required to compensate him for the removal of the driveway access to USH 51. By revoking the permit, the Department will be able to remove the driveway without paying any compensation. Owners of property abutting a public roadway have a right of access to the roadway. However, they do not have a right to access at a particular point. If the driveway access to USH 51 is removed, the Meyers property will still have access to the public highway via the driveway onto Lakeview Drive. The issue is whether the Lakeview Drive access constitutes reasonable, alternative access.

Meyers contends that the Lakeview Drive access is not a reasonable, alternative to the USH 51 access for two reasons. One reason is that the garage on the property will only be accessible by driving across the Department's right-of-way. This condition is apparently the result of the previous owner constructing the garage up to the lot line. An accommodation was made so that the garage was accessible via the USH 51 driveway access. However, this accommodation does not work for the driveway access from Lakeview Drive. Meyers also provided testimony that using the Lakeview Drive access will result in the loss of some parking spaces on the property. However, Meyers did not indicate how many parking spaces were needed to accommodate the two tenants currently occupying the property.

The other reason Meyers cited to support his contention that the Lakeview Drive access does not constitute a reasonable, alternative access is the extra distance motorists will have to travel to reach the Lakeview Drive driveway. The distance from the existing driveway access onto USH 51 to the Lakeview Drive access is not significant. The use of the alternative access becomes a significant inconvenience only if a motorist misses the turn onto proposed Huber Lane and has to turn around and backtrack. Currently the property is used as residential rental property. The tenants and their guests should not have a problem with missing the turn.

The property is zoned for business use. Meyers' concern is that the route to the Lakeview Drive driveway will be confusing to customers if a business is established on the property. At this time, any other use for the Meyers property is speculative. It is unrealistic to assess the reasonableness of access based on potential uses of a parcel of property. If and when the use of the property changes, Meyers or a successor owner can apply for a permit for a driveway access unto USH 51. By revoking permit no. 43-96-70 (977) the Department is seeking to eliminate an existing driveway access, not terminate the access rights to the property.

The Wisconsin Supreme Court discussed an abutting property owner's right to driveway access in two cases, *Narloch v. DOT*, 115 Wis. 2d 419, 34 N.W.2d 542 (1983) and *Stefan Auto Body v. State Highway Commission*, 21 Wis.2d 363, 124 N.W.2d 319, (1963). The opinion in *Narloch* involved three cases in which property owners were seeking compensation for loss of access rights. In *Narloch*, the court held "that 'existing right of access' in sec. 32.09(6)(b), Stats., includes the right of an abutting property owner to ingress and egress, and the right to be judged on the criteria for granting permits for access points under sec. 86.07(2) and Wis. Adm. Code Ch. Hy. 31 [now Ch. Trans 231, Wis. Adm. Code]." 115 Wis. 2d 419, at 432. The Meyers property retains its access rights.

Each party raised an issue that was not considered in this decision. The Department provided testimony that the existing driveway connecting the Meyers property to USH 51 has a gravel surface and has a relatively steep grade. The Department's witness testified that these factors force a motorist to slow down more than one would have to if the surface was paved and the grade was flatter. Assuming that the Department's witness is correct regarding motorists' behavior, this testimony is immaterial. To the extent that these factors would cause motorists to slow excessively before turning into the driveway, these conditions can easily be remedied if necessary. The design of the driveway is not a material consideration regarding whether the access is reasonable.

Similarly, Meyers presented evidence that because of the placement of the garage on the property, motorists accessing the property from Lakeview Drive will have to drive across the Department's right-of-way to drive into it. The Department stipulated that it will allow occupants of the Meyers property to cross its right-of-way to drive into the garage. Meyers does not want to rely on this assurance. If necessary, the garage can be altered so that it will not be necessary to cross the Department's right-of-way. The issue is reasonable access to the property. Factors within the control of the property owner that create obstacles or problems with using a particular access should not be considered in evaluating the reasonableness of the access.

Even though it is difficult to tie any particular accident to the driveway access to USH 51 from the Meyers property, engineering standards clearly demonstrate that the removal of accesses promote highway safety and the efficient functioning of public highways. For high functioning highways, it is well established that eliminating an access will improve highway safety. Abutting property owners have a right to access to a highway. The issue is whether an alternative access constitutes a reasonable alternative to the one that the Department is proposing to remove. The Department has demonstrated that the Lakeview Drive driveway constitutes a reasonable, alternative access for the Meyers property to the existing USH 51 access for the

current use of the Meyers property. Accordingly, the Department's removal order should be affirmed.

CONCLUSIONS OF LAW

The Administrator concludes:

1. The petitioner, Mike Meyers, has reasonable, alternative access to his property in the Town of Minocqua via the existing driveway access from Lakeview Drive. The existing driveway access from USH 51 is unnecessary and reduces traffic safety on USH 51. The Department of Transportation's decision to revoke driveway access permit number permit no. 43-96-70 (977) is reasonable and consistent with the standards of Wis. Stat. § 86.07
2. Pursuant to Wis. Stats. § 86.073(1), the Department has the authority to revoke driveway access permit no. 43-96-70 (977).
3. Pursuant to Wis. Stat. §§ 86.07(3) and 227.43(1)(bg), the Division of Hearings and Appeals has the authority to issue the following order.

ORDER

The Administrator orders:

The Department of Transportation's decision to revoke driveway access permit number permit no. 43-96-70 (977) issued for the property now owned by Mike Meyers is hereby **AFFIRMED**.

Dated at Madison, Wisconsin on May 1, 2013.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: _____
David H. Schwarz
Administrator

NOTICE

Set out below is a list of alternative methods available to persons who may wish to obtain review of the attached decision of the Division. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.

2. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (1) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Any petition for judicial review shall name the Division of Hearings and Appeals as the respondent. The Division of Hearings and Appeals shall be served with a copy of the petition either personally or by certified mail. The address for service is:

DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705-5400

Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. § 227.52 and 227.53 to insure strict compliance with all its requirements.